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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 663

MONROE ZIPP, et al.,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

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COMMISSIONER OF INTERNAL REVENUE,

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PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States.

Monroe Zipp and Helen Zipp, Bernard Zipp and Jean B. Zipp, your Petitioners, pray that a Writ of Certiorari issue to review the judgments of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled cases on May 21, 1958, affirming decisions of the Tax Court of the United States against your Petitioners.

OPINIONS BELOW.

The cases herein presented were consolidated for trial in the Tax Court of the United States, which rendered decisions against your Petitioners on July 10, 1957 and are reported at 28 T. C. 314. The opinion of the Tax Court appears at page 107a of Petitioners' Appendix Rec-

ord below, nine extra copies of which are filed herewith. A petition for review was timely filed in the United States Court of Appeals for the Sixth Circuit and judgment rendered affirming the decisions of the Tax Court. The Court of Appeals opinion, rendered per curiam, is reported at 259 F. 2d 119 (Appendix page 16, *infra*).

JURISDICTION.

The judgment of the United States Court of Appeals for the Sixth Circuit was rendered on May 21, 1958. A petition for rehearing was timely filed by your Petitioners and was denied by said Court of Appeals on October 27, 1958.

The statutory provision conferring jurisdiction upon this Honorable Court to review the judgment against your Petitioners by said Court of Appeals is Sec. 1254(1) of Title 28, United States Code.

STATUTES INVOLVED.

Pertinent sections of statutes involved herein and in force at the times involved are as follows:

Internal Revenue Code of 1939:

"Sec. 115(a). *Definition of Dividend*—The term 'dividend' when used in this chapter (except in section 201(c)(5), section 204(c)(11) and section 207(a)(2) and (b)(3) (where the reference is to dividends of insurance companies paid to policy holders)) means any distribution made by a corporation to its shareholders, whether in money or in other property, (1) out of its earnings or profits accumulated after February 28, 1913, or (2) out of the earnings or profits of the taxable year (computed as of the close of the taxable year without diminution by reason of any distributions made during the taxable

year), without regard to the amount of the earnings and profits at the time the distribution was made. * * *"

"Sec. 115(g) *Redemption of Stock*

(1) In General—If a corporation cancels or redeems its stock (whether or not such stock was issued as a stock dividend) at such time and in such manner as to make the distribution and cancellation or redemption in whole or in part essentially equivalent to the distribution of a taxable dividend, the amount so distributed in redemption or cancellation of stock, to the extent that it represents a distribution of earnings or profits accumulated after February 28, 1913, shall be treated as a taxable dividend."

"Sec. 275(c) *Omission from Gross Income*—If the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 per centum of the amount of gross income stated in the return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 5 years after the return was filed."

QUESTION PRESENTED.

Where a portion of the stock of a shareholder in a closely held corporation is purchased by the corporation, the remainder of the stock held by said shareholder then being transferred to the remaining shareholders, who are under no obligation to purchase or pay for such stock, and which transactions result in the remaining shareholders becoming the sole shareholders of such corporation, does the payment to the selling shareholder by the corporation for such stock out of its earnings and profits result in a distribution essentially equivalent to a taxable dividend to the remaining shareholders?

STATEMENT.

Paramount Steel and Supply Co. (hereinafter referred to as Paramount) was an Ohio corporation organized on August 29, 1936 and had its principal place of business and offices, plant and yard at Cleveland, Ohio. Paramount's business at all times was the purchase, processing and resale of scrap iron. Louis Zipp (hereinafter sometimes referred to as Louis), the father of Monroe and Bernard Zipp (hereinafter called Monroe and Bernard, Petitioners, or sons), organized Paramount with authorized stock of 100 shares of no par value common stock, of which 50 shares were issued with a declared value of $10.00 per share. As of May 23, 1947 Louis held 48 shares and Bernard and Monroe each held one share.

Bernard and Monroe worked for Paramount in various capacities. On May 24, 1947 Louis transferred 23 shares of Paramount stock to each of his sons. Pursuant to this transfer Louis filed a Federal gift tax return reporting the gift of the 46 shares to his sons and paid the gift tax.

Subsequently there were arguments between Louis and his sons over the policies and operations of Paramount and in May of 1950 they became involved in a serious dispute. It was then decided that Louis would leave the business, and his interest in Paramount would be terminated completely. On May 29, 1950 an agreement was executed between Louis and Paramount which provided in substance as follows:

(1) Louis agreed to sell his two shares of Paramount stock to Paramount, to resign as director and general manager of Paramount, to relinquish all claim to and right in any further salaries and extra compensation from Paramount in 1950 and thereafter, and not to engage in

the business of buying, selling or dealing in scrap metals or in any other similar business in Ohio for a period of ten years nor to interfere in any manner with the business of Paramount in Ohio.

(2) In consideration of the foregoing Paramount agreed to pay Louis $75,000 in cash, to forgive all sums owing to Paramount by Louis, and to convey to him a Cadillac automobile. The consideration passing to Louis from Paramount totaled $93,782.50. At the time this agreement was executed the earned surplus of Paramount amounted to $93,790.90, and this surplus represented earnings of the corporation since its organization in 1936.

The Commissioner contended that Paramount's payment of $93,782.50 to Louis constituted taxable dividends to the sons under Sec. 115, Internal Revenue Code of 1939. The Tax Court found that the transfers of stock to Petitioners in 1947, notwithstanding the filing of gift tax returns, were not gifts but rather transfers of title with retention of beneficial interest in Louis. The court further found that, in connection with the sale of the two shares by Louis to Paramount, Louis released to the Petitioners all of his interest in the said 46 shares held by Petitioners.

The Court did not find any agreement between Louis and the Petitioners relating to this transfer to them, nor did it find that the Petitioners in any way obligated themselves personally to pay for any part of the stock sold by Louis.

The only existing obligation to pay for the shares purchased was the corporation's.

On July 10, 1957 the Tax Court nevertheless rendered decisions sustaining the deficiencies of $20,926.88 asserted against each son.

A petition for review of the Petitioners' cases was timely filed in the Court of Appeals for the Sixth Circuit pursuant to Secs. 7482 and 7483 of the Internal Revenue Code of 1954. In a *Per Curiam* opinion rendered on May 21, 1958 the Court of Appeals affirmed the decisions of the Tax Court in both cases. Petitioners filed a petition fer rehearing which was denied by the Court of Appeals on October 27, 1958.

REASONS FOR GRANTING THE WRIT.

I. The Court of Appeals' decision that Petitioners received taxable income in the year 1950 is in conflict with decisions of this Honorable Court defining "Income" for tax purposes under the Sixteenth Amendment to the Constitution of the United States.

In order for the Petitioners to be charged with the receipt of a taxable dividend, it must be shown either:

(1) that *Petitioners* received a distribution from the corporation of money or property out of the corporation's accumulated earnings and profits. Sec. 115(a), Internal Revenue Code of 1939; or

(2) that a distribution by the corporation to a third party was a constructive dividend to Petitioners in that it discharged some obligation or indebtedness of the Petitioners. *Ferro v. Commissioner* (C. A. 3rd, 1957) 242 F. 2d 838; *Woodworth v. Commissioner* (C. A. 6th, 1955) 218 F. 2d 719; *Lowenthal v. Commissioner* (C. A. 7th, 1948) 169 F. 2d 694; *Wall v. United States* (C. C. A. 4th, 1947) 164 F. 2d 462.

Admittedly no distribution was made directly to the Petitioners. All moneys and property were paid by Paramount to Louis. Therefore, the first requirement above has not been shown.

Neither has it been found that any obligation or indebtedness of the Petitioners existed in connection with the purchase of Louis' stock by Paramount. They neither agreed to buy nor to pay for any part of Louis' shares. The second requirement as to taxability therefore also fails.

It would appear, consequently, that the *only* bases upon which the Commissioner's contention and the courts' decisions can be grounded are that (1) the release by Louis to the Petitioners of his beneficial interest in the 46 shares was a constructive dividend to the Petitioners; or (2) the increase in Petitioners' percentage ownership of the corporation by the redemption of Louis' interest resulted in a constructive dividend to Petitioners. Both of these contentions must fall.

(1) First, the release by Louis can in no wise be construed to be a distribution *by the corporation*. Sec. 115, 1939 Code. Second, had Louis not released the shares to Petitioners but rather to the corporation, the Petitioners would then have owned two shares of stock, being all of the then outstanding shares. By receiving the 46 shares, the Petitioners owned 48 shares, being all of the then outstanding shares. It is obvious, therefore, that all that was accomplished by the release of the 46 shares to the Petitioners was that they owned more shares but no greater interest in the corporation.

This court has held in *Eisner v. Macomber* (1920) 252 U. S. 189 that a stock dividend distributed to stockholders which merely increased the number of shares held, but not the proportionate ownership of the corporation, was not a taxable dividend.

(2) The mere increase in the proportionate ownership of the corporation which results from the redemption of all of a shareholder's stock has been held not to be a taxable dividend to the remaining stockholders. *Holsey*

v. Commissioner (C. A. 3rd, 1958) 258 F. 2d 865, rev'g. 28 T. C. 962 (1957); *Tucker v. Commissioner* (C. A. 8th, 1955) 226 F. 2d 177, rev'g. 23 T. C. 115 (1954); *Joseph P. Schmidt v. Commissioner* (C. A. 3rd, 1954) 208 F. 2d 819, rev'g. 20 T. C. 352; *Fox v. Harrison* (C. C. A. 7th, 1944) 145 F. 2d 521; *Ray Edenfield* (1952) 19 T. C. 13; *Fred F. Fischer* (1947) 6 T. C. M. 520; *S. M. K. Ames, Inc.* (1942) 46 B. T. A. 1020, acq. 1942-1 C. B. 1; *J. S. Hatcher* (1930) 18 B. T. A. 632; *George Yowell* (1929) 18 B. T. A. 599; *A. M. Lowrence* (1928) 13 B. T. A. 463.

In some of the cases cited the redemption resulted in substantial increase in value of the remaining shareholders' stock; yet no taxable dividend was found. See also the following decisions of this Court for the proposition that a mere increase in the value of property is not income, but merely an unrealized increase in capital. *Helvering v. San Joaquin Fruit & Investment Co.* (1936) 297 U. S. 496; *General Utilities & Operating Co. v. Helvering* (1935) 296 U. S. 200; *LaBelle Iron Works v. U. S.* (1921) 256 U. S. 377; *Eisner v. Macomber, supra; Lynch v. Turrish* (1918) 247 U. S. 221; see also, 1 Mertens *Law of Federal Taxation,* secs. 5.04, 5.05. *A fortiori,* this rule should apply where, as here, the redemption of Louis' stock actually resulted in a decrease in value of the Petitioners' shares.

II. The Court of Appeals for the Sixth Circuit has rendered a decision in the instant case which is in conflict with decisions of other Courts of Appeal on the same matter.

In *Holsey v. Commissioner* (C. A. 3rd, 1958) 258 F. 2d 865, rev'g. 28 T. C. 962 (1957), the taxpayer was a 50% stockholder in a corporation. The other 50% stockholder granted to the taxpayer the option to purchase all

of his shares for a certain price. Prior to the exercise of the option and when the stock of the optionor had increased greatly in value, the taxpayer transferred the option to the corporation, the corporation exercised the option and purchased the shares at the low option price. Taxpayer thus became the holder of all of the outstanding stock of the corporation.

The Tax Court held that the purchase of the stock by the corporation resulted in a taxable dividend to *Holsey*, the remaining stockholder, on the theory that the purchase of the stock by the corporation was for *Holsey's* "benefit."

The Court of Appeals for the Third Circuit reversed the Tax Court, holding that the redemption was not "essentially equivalent to a dividend." It stated that to be taxable the distribution must be made *to* a taxpayer or *for* his benefit. The fact that the taxpayer's own stock increased in value or that his proportionate interest in the corporation was thereby increased does not justify taxation of these *indirect* benefits as dividends.

It is submitted that the decision of the Court of Appeals for the Sixth Circuit in the instant case is in direct conflict with *Holsey, supra.*

In both cases the distribution was made to persons other than the taxpayer, the percentage of ownership of each was thereby increased, neither had a personal obligation to purchase the shares of the retiring shareholder or to pay for them, and the indirect benefits obtained by each taxpayer were identical in nature.

The Commissioner of Internal Revenue has acquiesced in the *Holsey* case. See Rev. Rul. 58-614, 1958-51 IRB 49, stating that "In the future, the Service will not treat the purchase by a corporation of one shareholder's stock as a dividend to the remaining shareholders merely

because their percentage interests in the corporation are increased."

The decision of the Circuit Court in this case is also in direct conflict with *Tucker v. Commissioner* (C. A. 8th, 1955) 226 F. 2d 177, rev'g. 23 T. C. 115 (1954), where the taxpayer *personally* agreed to purchase the shares of another stockholder, the corporation agreeing to pay to the seller part of the purchase price of the stock in the form of a percentage of profits.

The Tax Court held that such payments by the corporation were constructive dividends to the taxpayer. The Court of Appeals for the Eighth Circuit reversed the Tax Court decision, notwithstanding the satisfaction of the taxpayer's *personal obligation* by the corporate payments.

III. The Court of Appeals' novel holding below has decided an important question of federal tax law which has not been, but should be settled by this Honorable Court.

It has long been recognized that a market place for capital investments is an essential element of our economic system. Such a market place is the stock market where investors are reasonably able to liquidate investments or change from one to another. The stock market contributes greatly to the confidence in the economy as a whole and it attracts capital out of savings accounts to be put to more productive uses which benefit the nation's economy. Stock exchanges efficiently perform this important service for investors in corporations large enough to list their securities in the exchanges. Over-the-counter markets also provide this service for other securities which are sufficiently widely held to allow rather steady sale and purchase ac-

tivity. Investors in these securities are able to buy and sell and receive the benefit of capital gains rates on any gains if the investment is held for the minimum six-month period.

Everyone will agree that small business is an important part of our economy and that it is worth preserving as well as promoting. Congress recognizes this as shown by the favorable Small Business legislation enacted into law in 1958 and also is shown by the provisions of the Internal Revenue Code of 1954 which favor small businesses. Investment in new and small corporate enterprises is necessary if opportunities for profits for individual investors are to be preserved, as distinguished from institutional and corporate investors. However, there is no comparable market place for investments in closely held corporations where such investments may be easily exchanged for reasonably adequate consideration. Few investors are willing to buy a part of a small business and only where there is mutual trust and confidence between such investors do they join together in a joint enterprise.

When an investor in a small corporate business for any of a multitude of reasons chooses to liquidate his investment, fairness demands that he be as free to do so as other taxpayers. When it comes to liquidating such investments, generally only the corporation itself can serve the function of the market place and provide funds to liquidate the investment at a reasonable price. The use of the corporation as such a market place seems proper since the investment was put into the corporate enterprise by the investor and, if successful, profits were earned thereon and taxed.

However, because of the holding of the Tax Court and Court of Appeals in the case at bar, the liquidation of the investment of a risk-taker in a closely held corpora-

tion would result in the Commissioner receiving two taxes on the distribution by the corporation in liquidation of the retiring investor's interest, i.e., a capital gain or ordinary income tax on the gain to the retiring investor and an ordinary income tax in the amount of the distribution to the remaining investors. This result certainly does not provide the type of climate which would encourage and promote individual risk-takers to invest capital in new and small corporate businesses. Furthermore Congress did not intend such a result. As stated by Prof. Surrey and Dean Warren:

> "Is the result of a dividend (to the surviving shareholder) intended by a Congress which went to extreme pains in Sec. 302(b)(3) (of the Internal Revenue Code of 1954) to make sure that the redemption would not fail of accomplishment because of the fear of a dividend (to the deceased or retiring shareholder). But the dividend result for (the surviving shareholder) would equally block the redemption." C. C. H. Surrey and Warren, *Federal Taxation—Current Law Practice*, par. 1215, p. 371 (Dec. 1957).

In the Committee reports of the Select Committee on Small Business of the United States Senate (86th Congress) reported in the *Journal of Taxation*, May, 1958, at page 306, the following statement was made condemning the Tax Court opinion in the instant cases as thwarting the intent of Congress:

> "Another example of administrative discrimination toward small concerns is exemplified by a statement submitted at the Minneapolis hearing:
>
> > 'I am particularly concerned by an apparent *new concept* in taxing stock redemption by small-business corporations and which, if broadly enforced, will result in great tax inequity and an impossible tax burden on small corporations.'

"The witness went on to explain that the treasury was arguing that a redemption of stock of another stockholder was a dividend to him.

'This concept, I am told, is supported by two recent cases of the Tax Court of the United States (*Joseph R. Holsey*, 28 T. C. No. 107, August, 1957, and *Louis H. Zipp*, 28 T. C. No. 32, May, 1957). This redemption has not increased my present net worth in any sense and the "constructive dividend" so called is non-existent.

'To my way of thinking, this new concept cannot help but result in killing off any incentive to let small corporations grow. Shareholders, who are also employees, will want to withdraw earnings in the form of salaries rather than to expand their business, realizing that any expansion will result in a greater tax to them when any shareholder died or wants to withdraw.' * * *

"The Treasury in each of these examples has set out to accomplish something not provided for by law and in the last two instances (referring to the Zipp situation) actually appears to run counter to the intent of Congress * * *

"In the first instance, your Committee wishes to condemn any activity which operates to negate a benefit intended by Congress. In instances cited in the above discussions, it is clear that Treasury has dragged its feet and operated to thwart the intent of Congress where provisions did not meet with Treasury approval. * * *" (Emphasis ours.)

The importance and unsoundness of the Tax Court and Court of Appeals decisions in the administration of the Federal tax law as applied to closely held corporations is illustrated by the unusually numerous authoritative articles uniformly criticizing these decisions published in recent periodicals. Robert F. Graham, *Redemption Prob-*

lems—The *Holsey* and *Zipp* cases, 36 Taxes 925 (Dec. 1958); Prof. Richard Lloyd Strecker, *Corporate Buy-Sell Agreements: Tax Problems,* 15 Wash. & Lee L. Rev. 18, 23 (Sp. 1958); Harry Lamar Jones, *How Stock Redemptions Produce Dividend Income,* 36 Taxes 437 (June 1958); L. William Seidman, *The Unexpected, Untimely and Uninvited Dividend,* 36 Taxes 166 (Mar. 1958); C. D. Tomlins, *Dividend from Stock Redemption of Third Party,* 11 Okla. L. Rev. 99 (Fall 58); Alvin B. Rubin, *Another Hazard in Redemption of Corporate Stock,* 44 Amer. Bar Assn. J. 177 (Feb. 1958); Richard D. Hobbet, *The New Attack on Stock Redemptions,* 35 Taxes 830 (Nov. 1957).

The importance of the decisions of the Tax Court and Court of Appeals here is obviously recognized when one considers the frequent use of "buy and sell" agreements and other stock sale restrictive agreements to insure corporate harmony and control in closely held corporations. Taxpayers and their representatives and the tax bar as a whole are shocked by the decisions here and are in a quandary as to how redemptions or purchases under these agreements that have existed for years will be treated by the Commissioner and the courts. Furthermore, the use of such agreements in the future is shrouded with doubt and taxpayers' representatives are unable to advise how a retiring or deceased stockholder's interest in a closely held corporation may be liquidated without disastrous consequences to the remaining stockholders in the form of receipt of constructive dividends taxed at ordinary income rates.

Petitioners submit that the decisions of the Tax Court and Court of Appeals in the instant case announce for the first time the principle that where a closely held corporation redeems or purchases all the stock of a retiring or

deceased stockholder, the remaining stockholders have received constructive dividends in the form of the increase in their proportionate interest and control, and the "benefit received" thereby is valued by the amount of the distribution. Petitioners believe the instant case to be the only case which still stands for this result and submit that this Honorable Court has never before decided the issue presented here.

CONCLUSION.

For the reasons set forth above, and because of the conflict in decisions of various Circuits of the United States Court of Appeals, and the far-reaching consequences of the decision of the United States Court of Appeals for the Sixth Circuit, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

FRED H. MANDEL,
Counsel for Petitioners.

APPENDIX.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Nos. 13374-75.)

(Decided May 21, 1958.)

Before SIMONS, Chief Judge; MARTIN, Circuit Judge; and JONES, District Judge.

PER CURIAM. The petitions of two brothers, Monroe Zipp and Bernard Zipp, and their respective wives for review of decisions of the Tax Court of the United States, holding deficiencies of $20,926.88 in the income taxes of each for the year 1950, were consolidated for hearing. The somewhat complicated transactions between the two brothers and their father, Louis Zipp, the founder and practically sole owner of the Paramount Steel and Supply Company, led to this tax litigation.

The Paramount Steel and Supply Company had a total of fifty outstanding shares of capital stock: all of which, except a few qualifying shares, were owned by Louis Zipp. On May 24, 1947, he caused to be transferred to his two sons, Bernard and Monroe, 23 shares each of the capital stock of the company. The certificates were endorsed by the sons in blank and delivered to the custody of their father's attorney, who was also attorney for Paramount.

As found by the Tax Court, Louis Zipp, the father, in contemplation of a re-marriage consummated in 1947, discussed with his attorney the possible effects of such step upon his financial interest in Paramount and the possibility of future marital difficulties, which might jeopardize his interest in the company as well as interfere with the operation of its business. The Tax Court found on substantial evidence that, on advice of the at-

torney, all shares, except two, of the Paramount stock owned by Louis Zipp were put in the names of his two sons "so that they could not be reached by Louis' wife, if marital difficulties arose, or in the event of Louis' death, or in the event Louis became involved in any financial deals."

On May 29, 1950, the father—after he had been in a controversy with his sons—entered in an agreement in writing whereby he acknowledged that he had no interest, right, title or claim whatever in the two certificates for 23 shares each, issued to his respective sons, Bernard and Monroe Zipp. In accordance with the terms of the agreement, Louis Zipp received from the Paramount company the total consideration of $93,782.50, comprising $75,000 in cash, cancellation of an indebtedness to the company of $16,682.50, and an automobile valued at $2,100. The agreement recited that the earned surplus of Paramount as of May 29, 1950, amounted to $93,790.90.

The total consideration received by the father from Paramount was in exchange for all his forty-eight shares of stock in the company, whereof only two shares stood in his name. The certificates for these two shares were endorsed by him in blank and surrendered to the company. The result of the transaction was that, after May 29, 1950, the two Zipp brothers owned all the fifty shares of outstanding stock in Paramount Steel and Supply Company. Funds of the company were used to purchase this stock in an equal number of shares for each brother. The brothers did not report any income from the transaction of May 29, 1950.

The Commissioner of Internal Revenue determined that the deficiency in income tax liability of each of the petitioners, Monroe and Bernard Zipp, amounted to

$46,891.25, or one-half of $93,782.50, inasmuch as that amount had been withdrawn from the Paramount company by Louis H. Zipp in payment for forty-six shares of the company's capital stock which were acquired by the sons from their father as a result of the transaction. The Commissioner concluded from this that fifty percent of $46,891.25 was taxable as dividends to each of the brothers. The Tax Court upheld this determination by the Commissioner upon the ground that the father, Louis Zipp, had not made completed bona fide gifts of twenty-three shares of stock to each of his sons in May of 1947; that his sons had been made mere nominees whose names were used to suit his convenience; and that Louis Zipp had remained owner of the shares and was such at the time he entered into the agreement with Paramount on May 29, 1950.

The Tax Court concluded that Paramount had paid Louis Zipp $93,782.50 for all forty-eight shares of his stock and that Louis Zipp had sold these shares, it being abundantly clear that the transactions of May 29, 1950, were to enable the sons to purchase all the father's interest in the Paramount Steel and Supply Company; and that, it being a family corporation, it was possible for them to proceed as they had. It was reasoned further that the sons had not made loans from Paramount, but had caused its cash to be distributed for their benefit, namely, to enable them to purchase all their father's stock. It was reasoned further that, inasmuch as Paramount had accumulated earned surplus in the amount of $93,790.90, it must be concluded that the payment of $93,782.50 by Paramount constituted taxable dividends constructively received in equal parts by the two sons. See I. R. C., 1939, § 115(b); cf. *Paramount-Richards*

Theatres v. Commissioner, 53 F. (2d) 602, 604 (C. A. 5); *Byers v. Commissioner*, 199 F. (2d) 273, 275 (C. A. 8).

Accordingly, for the foregoing reasons, more fully disclosed by the findings of fact and the opinion of the Tax Court, the decision of that court in each of these two cases is affirmed.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(No. 13,374.)
(Filed May 21, 1958.)

On petition to review a decision of the Tax Court of the United States.

This cause came on to be heard on the transcript of record from the Tax Court of the United States, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the decision of the said Tax Court in this cause be and the same is hereby affirmed.

(A like judgment was entered in Case No. 13,375.)

ORDER DENYING REHEARING.

(Nos. 13,374 and 13,375.)
(Filed October 27, 1958.)

The petition for rehearing is denied.